Supreme Court, U.S.
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No. 99-1565

In The

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MARIA V. CRUZ, for herself and as representative of GUSTAVO CRUZ and JOAQUIN RODRIGUEZ, minors; BEATO CRUZ; SANDRA MARIA CRUZ as representative of YOVARY POLANCO, a minor; JOSE ALFREDO GOMEREZ; and LENOR DURAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The sole issue presented is whether the Court of Appeals correctly held that petitioner air carrier, as expressly provided by Warsaw Article 4(4), may not avail itself of the Convention's checked baggage liability limit where it does not comply with the mandate of Article 4(3)(f) that the weight of the checked baggage be recorded on the passenger's baggage check, *i.e.*, the combined passenger ticket and baggage check. The opinion below adheres to the clear and unambiguous text of a multinational Treaty and is wholly consistent with its drafting history, as well the decision of this Court in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). There is no conflict among the Circuits on the issue presented. Moreover, it is of rapidly fading import since Article 4(3)(f) was deleted from the Convention, as applicable to transportation involving the United States, by an Treaty amendment which came into force on March 4, 1999.

A. NO CIRCUIT CONFLICT EXISTS

Three Circuit Courts of Appeal have addressed the issue presented, and no conflict exists as requires resolution by this Court.

The most expansive and recent of these decisions is that of the District of Columbia Circuit from which review is here sought. *Cruz v. American Airlines*, 193 F.3d 526 (D.C.Cir. 1999). Four months earlier, the Ninth Circuit similarly held that Warsaw Article 4(4) barred a carrier from availing itself of the Convention's checked baggage liability limit where it had failed to comply with the weight recordation requirement of Article 4(3)(f). *Spanner v. United*

Airlines, 177 F.3d 1173 (9th Cir. 1999). In so holding, both courts found that a literal construction of the clear and unambiguous command of the Treaty text was required consistent with this Court's decisions on Treaty construction, particularly that of *Chan*, in holding that courts lack the power to alter the clear text of the Convention.

Twelve years earlier, the Second Circuit had considered the issue in *Republic National Bank v. Eastern Airlines*, 815 F.2d 232 (2d Cir. 1987). Employing the "commercial significance" test it earlier had adopted in construing Warsaw's Article 8 cargo waybill provisions, the court held that a literal compliance with the weight recordation requirement of Article 4(3)(f) is not required in those cases "where, as here, the traveler is more like a commercial shipper than the typical airline passenger." *Republic National Bank*, 815 F.2d at 237. As discussed below, the Second Circuit's Article 8 analysis, in light of *Chan*, has been limited to its facts.

Moreover, the Second Circuit never has found the literal mandate of Warsaw Article 4(4) not to be fully applicable to the checked baggage claims of "typical airline passengers." Nor have the courts in the Eastern and Southern Districts of New York in considering and rejecting carriers' invocation of that limit. *Vekris v. People's Express Airlines*, 707 F.Supp.675 (S.D.N.Y. 1988); *Tchokponhove v. Air Afrique*, 953 F.Supp. 79 (S.D.N.Y. 1996); *Siben v. American Airlines*, 913 F.Supp. 271, 276-77 (S.D.N.Y. 1996). Moreover, it simply is not true, as petitioner asserts, that the District Court and the Second Circuit recently have held that a carrier may avail itself of Warsaw's baggage liability limit where the baggage weight is not recorded on the

transportation documents. Petition, p.10, n.6 citing *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155 (S.D.N.Y. 1996), *rev'd in part, aff'd in part*, 122 F.3d 99 (2d Cir. 1997). In fact, as noted in respondents' Reply Brief to the Court of Appeals reproduced in pertinent part in Appendix A hereto, that issue, as petitioner knows, was not decided by the District Court and was not even raised on appeal!

B. THE ISSUE PRESENTED LACKS SIGNIFICANCE

By a Treaty amendment effected by Montreal Protocol No. 4, Article 4(3)(f) was removed from Warsaw, effective March 4, 1999. The issue presented thus has limited and rapidly diminishing significance and does not warrant this Court's consideration. Since Warsaw Article 29 imposes a two year period of limitations on damage suits, all suits as might raise that issue will be foreclosed within less than a year. In addition to the instant *Cruz* litigation, only three other cases, filed in November and December, 1999 in the U.S. District Court for the District of Columbia, are now pending which raise the issue presented and rely upon the Court of Appeals' decision in *Cruz*. Petition, p.24, n.11.

C. THE ISSUE WAS CORRECTLY DECIDED.

Both the weight of judicial opinion and Warsaw's clear negotiating history are in accord with the Court of Appeals' determination that the weight recordation requirement of Article 4(3)(f) is a mandatory requisite for a carrier's ability to avail itself of the Convention's baggage liability limit. In so holding, the Court of Appeals in *Cruz* flatly repudiated the earlier decision of the D.C. District court finding the requirement to be a technical and insubstantial omission from

which a court may depart to effectuate its own conception of Convention purposes. *Cruz*, Petition, pp. 7a-8a, rejecting *Martin v. Pan American World Airways*, 563 F.Supp. 135 (D.D.C. 1983).

Martin, the leading decision espousing petitioner's position and its reasoning, has been rejected by many courts over the years both prior to and again in light of this Court's decision in *Chan*. See, *Gill v. Lufthansa German Airlines*, 620 F.Supp. 1453, 1455-56 (S.D.N.Y. 1985); *Vekris, supra*; *Arkin v. New York Helicopter Corp.*, 544 N.Y.S. 2d 343, 345 (App. Div. 1st Dept. 1989); *Da Rosa v. TAP Air Portugal*, 796 F.Supp. 1508 (S.D.Fla. 1992); *Tchokponhove*, supra.

Warsaw Article 4(3)(f) is no stranger to this Court. The concurring opinion of four Justices in *Chan* states that the particulars of Warsaw Articles 4(3)(d), (f) and (h) are essential obligatory requirements. *Chan*, 490 U.S. at 144-45. As there noted, that conclusion is manifest from Warsaw's clear negotiation history on the subject. We reproduce in Appendix B a portion of respondents' Brief to the Court of Appeals detailing that history.

Lastly, petitioner extensively relies upon a series of Second Circuit precedent dealing with the interpretation of the rather dissimilar provisions of Warsaw Article 8 involving cargo carriage. In *Exim Indus., v. Pan Am. World Airways, Inc.*, 754 F.2d 106 (2d Cir. 1985), the court sanctioned a deviation from the literal application of some Article 8(h) and (i) waybill particulars because of textual ambiguity, principally flowing from the use of the French "ou." *Distribuidora Dimsa v. Linea Aerea del Cobre S.A.*, 976 F.2d 90, 96-97 (2d Cir. 1992). Following this Court's

decision in *Chan*, the Second Circuit severely limited its *Exim Industries* decision and "commercial significance" doctrine to its facts. *Maritime Insurance Co. v. Emery Air Freight*, 983 F.2d 437, 439-441 (2d Cir.1993). Inexplicably, petitioner does not bring to this Court's attention the Second Circuit's most recent pronouncement on this subject. In *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1033-34 (2d Cir. 1996), the court held that the omission of any enumerated cargo waybill particular deprives the carrier of recourse to the Convention's liability limit. Current Second Circuit law as to Warsaw's cargo liability limitation does not conflict with *Cruz*. See, *Tchokponhove, supra*.

D. ARTICLE 4(3)(f) WAS EXCISED BY AMENDMENT

Montreal Protocol No. 4 amended Warsaw to delete Article 4(3)(f) in its entirety and thereby abolish the long standing requirement that checked baggage weight must be recorded on the transportation document to enable the carrier to avail itself of the Convention's liability limit. The Court of Appeals held that "Montreal Protocol 4's luggage ticket provisions clearly amend prior law; as such they cannot possibly be given retroactive effect by being labeled a 'clarification'." Petition, p. 9a. Petitioner contends that what transpired was a mere clarification of the existing text.

The wholesale deletion of a requirement whose observance was a mandatory requisite for recourse to the Convention's liability limit hardly can be viewed as a clarification of a provision which has governed U.S. international transportation for almost seventy years. The meaning of Article 4(3)(f) has not been in dispute; what has been is whether it must be literally applied. There is no

comparability between this amendment of the Convention and those two instances where Montreal Protocol No. 4 made slight textual changes in continuing Warsaw provisions which the courts have held serve to clarify, and not to alter or effect any substantive change in, those provisions. Those decisions illustrate the fundamental difference between clarifying textual modifications and the total textual excision that occurred here. See, *Cortes v. American Airlines*, 177 F.3d 1272, 1282-90 (11th Cir. 1999); *El Al Israel Airlines, Ltd. v. Tseng*, 119 S.Ct. 662, 674 (1999).

Unless the law maker has authoritatively indicated that a substantive change should be given retroactive effect, a change in law "which takes away or impairs existing rights acquired under existing laws" or "attaches new legal consequences to events completed before its enactment" will not be given retroactive effect. *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994); *Hughes Aircraft Co. v. U.S.*, 117 S.Ct. 1871, 1876-77 (1997). No such direction here exists.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Excerpt from respondents' Reply Brief to the Court of Appeals in *Cruz v. American Airlines*, pp. 7-8.

American argues (Brief, p. 19) that the Second Circuit in its *Tseng* disposition effectively ratified a purported holding by the District Court that a carrier may utilize a tariff "deemed" weight in applying the Warsaw liability limit where the weight is not inscribed on the baggage ticket. American is simply wrong as to what was before, and what were the holdings of both the *Tseng* District Court and Court of Appeals.

Ironically, it was the *Spanner* District Court, later reversed by the Ninth Circuit on the ultimate merits, which first considered and rejected the contention that this "deemed weight" issue had been adjudicated by the *Tseng* District Court. Judge Illston noted:

> "United relies extensively on Tseng v. El Al Israel Airlines, Ltd., 919 F.Supp. 155 (S.D.N.Y. 1996), aff'd in part, rev'd in part, 122 F.3d 99 (2d Cir.1997). That case is not particularly helpful here, however. While the court in Tseng holds that '[w]here the weight of a passenger's baggage is not noted on the baggage check, the weight may be based on the

> maximum allowable weight as set forth in the airline's tariff,' id at 160, the court was simply trying to determine the appropriate compensation under the Warsaw Convention when no evidence about the weight of the lost bag was available, rather than trying to determine what the airline's exact obligations were under Article 4(4)." 1998 WL 196466 *4, n.4 (N.D.Cal.)

Contrary to American's contention, it is clear that the issue of non-compliance with Article 4(3)(f) was neither raised nor contested in *Tseng*. As noted in the Second Circuit's decision, El Al did file an unsuccessful cross-appeal from the District Court's damage award. 122 F.3d at 108. But we are advised by the carrier's counsel of record, Diane Westwood Wilson of Condon & Forsyth, that El Al's challenge was to the trial court's finding that the carrier had been guilty of fraud within the meaning of Article 26(4) such as to excuse plaintiff Tseng's failure to comply with the notice requirements of Article 26(2). So much for the first of the alleged Second Circuit "precedents" advanced by American.

EXHIBIT B

Excerpt from respondents' Brief to the Court of Appeals in *Cruz v. American Airlines*.

The term "Minutes" refers to *Second International Conference on Private International Law, October 4-12, 1929, Warsaw, Minutes (R. C. Horner & D. Legrez translators)*, Fred B. Rothman & Co. 1975, ISBN 0-8377-1301-3.

The insertion into the draft Treaty of "number of pieces and weight" ticket particular was suggested by the German and Austrian delegations. Minutes 287-88, 316-17. Article 4 in its present form came before and was adopted by the plenary at its Sixth Session on the morning of October 9, 1928. The matters before the session were summarized by reporter De Vos as being: "[w]hat are the particulars to be inserted on the baggage check; what are the compulsory particulars; then, the principle of sanction in the case of the non-existence of the ticket or mistake in the particulars to be put on the baggage check." Minutes, 155. Mr. De Vos reported that the drafting committee of legal experts was in agreement in accepting proposals for new particulars including "[u]nder letter (f), indication of the number and weight of the parcels" and under letter (h) the statement that carriage is governed by the system of liability established by the Convention. Minutes, 155-56. De Vos then concluded his presentation by stating:

> On the subject of compulsory particulars, the committee decided to reduce these compulsory particulars to a strict minimum, and we have recognized letters (d), (f) and (h) as compulsory. This relates to the third paragraph relative to the sanction for omission of particulars on the check. The last paragraph was not modified like Article 3; that is to say that we have retained the same sanctions in the case of errors in the particulars, however only letters (d), (f) and (h) are now compulsory particulars. Minutes, 156.

The proposals of the drafting committee, as thus explicated, were adopted by the plenary without objection. Minutes, 156.